

(i) There is not pending any bankruptcy proceeding that was filed by or against such person and that was, as of the plan's termination date under section 4048 of ERISA, a reorganization proceeding under chapter 11 of title 11, United States Code (or under any similar law of a State or political subdivision of a State), or

(ii) The person has been discharged in any such proceeding, or

(iii) The person no longer exists.

(f) *Plan termination date in past when set.* If a plan's termination date under section 4048 of ERISA is in the past when it is established by agreement or court action as described in section 4048 of ERISA, then the first applicable 12-month period for determining the due dates of the termination premium begins with the later of—

(1) The first calendar month following the calendar month in which the termination date is established by agreement or court action as described in section 4048 of ERISA, or

(2) The first calendar month specified in paragraph (d)(1) of this section or (if paragraph (e) of this section applies) paragraph (e)(4) of this section.

(g) *Liability for termination premiums.* In the case of a DRA 2005 termination of a plan, each person that was a contributing sponsor of the plan on the day before the plan's termination date, or that was on that day a member of any controlled group of which any such contributing sponsor was a member, is jointly and severally liable for termination premiums with respect to the plan.

[72 FR 71230, Dec. 17, 2007]

APPENDIX TO PART 4007—POLICY GUIDELINES ON PREMIUM PENALTIES

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GENERAL PROVISIONS

1 What is the purpose of this Appendix?

This appendix sets forth principles and guidelines that we intend to follow in assessing, reviewing, and waiving premium penalties. However, this is only general policy guidance. Our action in each case is guided by the facts and circumstances of the case.

2 What defined terms are used in this Appendix?

The following terms are defined in part 4001 of this chapter: contributing sponsor, ERISA, PBGC, person, plan, and plan administrator. In addition, in this appendix:

(a) *Premium penalty* means a penalty under ERISA section 4007 and under this part for failing to pay a premium in full and on time.

(b) *Waiver* means reduction or elimination of a premium penalty that is being or has been assessed.

(c) *We* means PBGC.

(d) *You* means, according to the context,—

(1) A plan administrator, contributing sponsor, or other person, if—

(i) The person's action or inaction may be the basis for a premium penalty assessment,

(ii) The person may be required to pay the premium penalty, or

(iii) The person is requesting review of the premium penalty; or

(2) An employee or agent of, or advisor to, any of these persons.

3 What is the purpose of a premium penalty?

The basic purpose of a premium penalty is to encourage you to pay premiums in full and on time and to voluntarily self-correct any failure to do so.

4 What information is in this Appendix and how is it organized?

This Appendix has four divisions:

(a) *General provisions.* The General Provisions division (§§1–4) tells you the purpose and organization of the Appendix, the purpose of a premium penalty, and the definitions of terms used in the Appendix.

(b) *Premium penalty assessment.* The Premium Penalty Assessment division is reserved.

(c) *Waiver standards.* The Waiver Standards division (§§ 21–25) explains the principles that PBGC follows in waiving premium penalties.

(1) *Reasonable cause.* We waive premium penalties for reasonable cause, as explained in §§ 22–25.

(2) *Other waivers.* We also waive premium penalties in some other circumstances, such as mistake of law, as explained in § 21.

(d) *Procedures.* The Procedures division is reserved.

PREMIUM PENALTY ASSESSMENT

[Reserved]

WAIVER STANDARDS

21 What are the standards for waiving a premium penalty?

(a) *Facts and circumstances.* In deciding whether to waive a premium penalty in whole or in part under paragraph (b), we consider the facts and circumstances of each case.

(b) *Waivers.*

(1) *Provisions of law.* We waive all or part of a premium penalty if a statute or regulation requires that we do so. For example, ERISA section 4007(b) and § 4007.8 of this part provide for a waiver in certain circumstances involving business hardship, and § 4007.8 of this part also provides for waivers if certain “safe harbor” tests are met, and for a waiver of a premium penalty that accrues after the date of a bill for a premium underpayment if you pay the premium owed within 30 days after the date of the bill.

(2) *Reasonable cause.* We waive a premium penalty if you show reasonable cause for a failure to pay a premium in full and on time. See §§ 22 through 25 for guidelines on “reasonable cause” waivers. If there is reasonable cause for only part of a failure to pay a premium, we waive the premium penalty only for that part.

(3) *Legal errors.* We may waive all or part of a premium penalty if the failure to pay a premium in full and on time that gives rise to the premium penalty results from certain kinds of legal errors.

(i) *Erroneous legal interpretation—disclosed.* If a failure to pay a premium in full and on time results from your reliance on an erroneous interpretation of the law, we waive a premium penalty that arises from the failure if you promptly and adequately call our attention to the interpretation and the relevant facts, and the erroneous interpretation is not frivolous. If the interpretation affects a filing that you make with us, you should call our attention to the interpretation in writing with the filing. If you rely on the interpretation to justify not making a filing with us, you should call our attention to the interpretation in writing by the time prescribed for the filing not made.

(ii) *Erroneous legal interpretation—undisclosed.* If a failure to pay a premium in full and on time results from your reliance on an erroneous interpretation of the law, and you do not promptly and adequately call our attention to the interpretation and the relevant facts, we may nevertheless waive a premium penalty if the weight of authority supporting the interpretation is substantial in relation to the weight of opposing authority and it is reasonable for you to rely on the interpretation.

(iii) *Recent change in the law.* We may waive all or part of a premium penalty if the law changes shortly before the date a premium payment is due and the premium payment that you make by the due date would have been correct under the law as in effect before the change. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as the length of time between the change in the law and the premium due date, the nature and timing of any publicity given to the change in the law, the complexity of the legal issues, and your general familiarity with those issues.

(4) *Pendency of PBGC procedures.* We may waive all or a part of a premium penalty that is attributable to the pendency of PBGC review or other procedures. For example:

(i) If you request review of a premium penalty, and you make a non-frivolous argument in your request for review that you were not required to pay the premium or that you were, and still are, unable to obtain the information needed to determine the premium, we may waive the portion of the premium penalty that accrues during the review process. If you make such a non-frivolous argument with respect to a portion of the premium, we may apply this principle to that portion.

(ii) We may waive all or a part of a premium penalty if we believe that the pendency of PBGC procedures for identifying a premium delinquency and notifying you of the delinquency contributed to your failure to correct the delinquency more promptly.

(5) *Other circumstances.* We may waive all or part of a premium penalty in other circumstances if we determine that it is appropriate to do so. We intend to exercise this waiver authority only in narrow circumstances.

(c) *Action or inaction of outside parties.* In some cases an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization may assist you in complying with PBGC requirements. If the outside individual's or firm's action, inaction, or advice causes or contributes to a failure to pay a premium in full and on time, we apply our waiver authority as if the outside individual or firm were part of your organization. In the case of an outside individual who is part of a firm,

we generally consider both the individual and the firm to be part of your organization.

22 What is “reasonable cause”?

(a) *General rule.* In general, there is “reasonable cause” for a failure to pay a premium in full and on time to the extent that—

(1) The failure arises from circumstances beyond your control, and

(2) You could not avoid the failure by the exercise of ordinary business care and prudence.

(b) *Overlooking legal requirements.* Overlooking legal requirements does not constitute reasonable cause.

(c) *Action or inaction of outside parties.* If an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization assists you in complying with PBGC requirements, there is generally no reasonable cause for a failure to pay a premium in full and on time that arises from circumstances within the control of the outside individual or firm, or could be avoided by the exercise of ordinary business care and prudence by the outside individual or firm. The fact that you exercised care and prudence in selecting and monitoring the outside individual or firm is not a basis for a reasonable cause waiver.

(d) *Size of organization.* If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization’s failure to pay a premium in full and on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.

(e) *Size of premium underpayment.* In general, the larger a premium, the more care and prudence you should use to make sure that you pay it in full and on time. Thus, there may be reasonable cause for a small underpayment even though, under the same circumstances, we would conclude that a larger underpayment could have been avoided by the exercise of ordinary business care and prudence.

(f) *Collection and enforcement.* In determining whether reasonable cause exists, we do not consider either—

(i) The likelihood or cost of collecting the premium penalty, or

(ii) The costs and risks of enforcing the premium penalty by litigation.

23 What kinds of facts does PBGC consider in determining whether there is reason-

able cause for a failure to pay a premium?

In determining the extent to which a failure to pay a premium in full and on time arose from circumstances beyond your control and the extent to which you could have avoided the failure by the exercise of ordinary business care and prudence—and thus the extent to which waiver of a premium penalty for reasonable cause is appropriate—we consider facts such as the following:

(a) What event or circumstance caused the underpayment and when the event happened or the circumstance arose. The dates you give should clearly correspond with the underpayment upon which the premium penalty is based.

(b) How that event or circumstance kept you from paying the premium in full and on time. The explanation you give should relate directly to the failure to pay a premium that is the subject of the premium penalty.

(c) Whether you could have anticipated the event or circumstance.

(d) How you responded to the event or circumstance, including what steps you took, and how quickly you took them, to pay the premium and how you conducted other business affairs. Knowing how you responded to the event or circumstance may help us determine what degree of business care and prudence you were capable of exercising during that period and thus whether the failure to pay the premium could or could not have been avoided by the exercise of ordinary business care and prudence.

24 What are some situations that might justify a “reasonable cause” waiver?

The following examples illustrate some of the reasons often given for failures to pay premiums for which we may assess penalties. The situation described in each example may constitute reasonable cause, and each example lists factors we consider in determining whether to grant a premium penalty waiver for reasonable cause in a case of that kind.

(a) *An individual with responsibility for taking action was suddenly and unexpectedly absent or unable to act.* We consider such factors as the following: The nature of the event that caused the individual’s absence or inability to act, for example, the resignation of the individual or the death or serious illness of the individual or a member of the individual’s immediate family; the size of the organization and what kind of backup procedures it had to cope with such events; how close the event was to the deadline that was missed; how abrupt and unanticipated the event was; how the individual’s absence or inability to act prevented compliance; how expensive it would have been to comply without the absent individual; whether and how other business operations and obligations were affected; how quickly and prudently a replacement for the absent individual was selected or other arrangements

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for compliance were made; and how quickly a replacement for the absent individual took appropriate action.

(b) *A fire or other casualty or natural disaster destroyed relevant records or prevented compliance in some other way.* We consider such factors as the following: The nature of the event; how close the event was to the deadline that was missed; how the event caused the failure to pay the premium; whether other efforts were made to get needed information; how expensive it would have been to comply; and how you responded to the event.

(c) *You reasonably relied on erroneous oral or written advice given by a PBGC employee.* We consider such factors as the following: Whether there was a clear relationship between your situation and the advice sought; whether you provided the PBGC employee with adequate and accurate information; and whether the surrounding circumstances should have led you to question the correctness of the advice or information provided.

(d) *You were unable to obtain information, including records and calculations, needed to comply.* We consider such factors as the following: What information was needed; why the information was unavailable; when and how you discovered that the information was not available; what attempts you made to get the information or reconstruct it through other means; and how much it would have cost to comply.

25 What are some situations that might justify a partial “reasonable cause” waiver?

(a) Assume that a fire destroyed the records needed to compute a premium payment. If in the exercise of ordinary business care and prudence it should take you one month to reconstruct the records and pay the premium, but the payment was made two months late, it might be appropriate to waive that part of the premium penalty attributable to the first month the payment was late, but not the part attributable to the second month.

(b) Assume that a plan administrator underpaid the plan’s flat-rate premium because of reasonable reliance on erroneous advice from a PBGC employee, and also underpaid the plan’s variable-rate premium because the plan actuary used the wrong interest rate. A PBGC audit revealed both errors. PBGC billed the plan for a premium penalty of \$5,000—\$1,000 for underpayment of the flat-rate premium and \$4,000 for underpayment of the variable-rate premium. The plan administrator requested a waiver of the premium penalty. While the erroneous PBGC advice constituted reasonable cause for underpaying the flat-rate premium, there was no showing of reasonable cause for the error in the variable-rate premium. Therefore, we would waive only the part of the premium penalty based on underpayment of the flat-rate portion of the premium (\$1,000).

PROCEDURES

[Reserved]

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